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In the Supreme Court of the United States

OCTOBER TERM, 1984

WAYNE LINDAHL, PETITIONER

v.

OFFICE OF PERSONNEL MANAGEMENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Federal Circuit has jurisdiction under 28 U.S.C. 1295(a)(9) to entertain a direct appeal from a decision of the Merit Systems Protection Board (MSPB) affirming the denial by the Office of Personnel Management (OPM) of an application for civil service retirement benefits.

2. Whether, if the court of appeals has jurisdiction under 28 U.S.C. 1295(a)(9) to review MSPB decisions in civil service retirement cases generally, judicial review nevertheless was barred in this case by 5 U.S.C. 8347(c), which provides that OPM's decisions on questions of disability arising under the civil service retirement laws "are final and conclusive and are not subject to review," except for review by the MSPB.

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BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (J.A. 45-85) is reported at 718 F.2d 391. The opinion of the Merit Systems Protection Board (J.A. 28-41) and the decisions of the Office of Personnel Management (J.A. 21-22, 25-27) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 22, 1983 (Pet. App. 1a). The petition for a writ of certiorari was filed on December 15, 1983, and was granted on June 18, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of 5 U.S.C. 7701, 7703 and 8347, and 28 U.S.C. 1295(a)(9), are reproduced at Pet. Br. App. 1a-7a, 16a-19a.

STATEMENT

1. On September 4, 1979, the Department of the Navy notified petitioner that it proposed to separate him from his civilian position as a police officer at the Naval Sup-

port Activity at Mare Island in Vallejo, California, because of his physical inability to perform the duties of his position (J.A. 10-12). The notice relied upon a report from petitioner's personal physician stating that petitioner had recurrent attacks of bronchitis and exhibited irritation of his bronchial tree when subjected to pollutants that were in the atmosphere at the Support Activity; that he was incapable of working there; and that he should not work overtime or engage in heavy exertion (J.A. 9, 10-11). The notice further explained that a medical officer had reviewed petitioner's physical qualifications and determined that he could not be assigned to the full range of duties required of a police officer at the installation (J.A. 11). Petitioner was afforded 10 days within which to respond to the advance notice of proposed separation, but failed to do so (J.A. 11-12, 14). Accordingly, by letter dated September 17, 1979, the Department of the Navy notified petitioner that, effective October 5, 1979, he would be removed from his position (J.A. 13-14). The letter advised petitioner that he could challenge his removal by filing an appeal with the Merit Systems Protection Board (MSPB) (J.A. 15), but there is no indication that petitioner ever filed such an appeal.

2. On October 9, 1979, petitioner formally filed an application with the Office of Personnel Management (OPM) for civil service disability retirement benefits (J.A. 17-19).[1] By letter dated April 8, 1980, OPM denied petitioner's application. OPM explained that the evidence failed to establish that he had a disability severe enough to prevent useful, efficient, and safe performance of the essential duties of his position as a police officer and that the retirement statute does not authorize the payment of benefits on the basis of a partial disability

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[1] On September 5, 1979, petitioner submitted a physician's statement to the Department of the Navy on a form that is used to accompany an application for retirement benefits (1 MSPB Rec. 83-84), but he did not file an application with OPM, as required by 5 C.F.R. 831.104 (1979).

(J.A. 21).[2] OPM reaffirmed that determination on reconsideration (J.A. 25-27), stating that although petitioner had subjective symptoms, there were "very few objective findings to uphold the symptomatology" (J.A. 26). OPM also noted that petitioner had poor conditioning because he was overweight and engaged in little physical activity and that his pulmonary function tests were normal (J.A. 26). Because of the absence of clinical findings to document a physical impairment incompatible with the retention of his duties, OPM could not find the requisite "sustained condition of total disablement for [the] position held" (J.A. 27).

3. Petitioner appealed OPM's reconsideration decision to the MSPB on January 9, 1981 (J.A. 28). That appeal was taken pursuant to 5 U.S.C. 8347(d)(1), which permits appeals to the MSPB from OPM decisions denying applications for civil service retirement benefits. After conducting a hearing, the MSPB presiding official affirmed OPM's denial of benefits (J.A. 28-41).

a. The presiding official first explained that an employee who files an application for disability retirement benefits has the burden of proving his entitlement (J.A. 29-31). The presiding official acknowledged that when an employee appeals to the MSPB from an adverse agency action based on misconduct or unacceptable performance, the applicable statutory and regulatory provisions (5 U.S.C. 7701(c)(1)(B); 5 C.F.R. 1201.56(a)(iii)(1980))

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[2] At the time petitioner filed his application, the term "disability" was defined under the civil service retirement laws to mean disability "for useful and efficient service in the grade or class of position last occupied by the employee * * * because of disease or injury not due to vicious habits, intemperance, or willful misconduct on his part within 5 years before becoming so disabled" (5 U.S.C. (1976 ed.) 8331(6)). In Section 403 of the Omnibus Reconciliation Act of 1980, Pub. L. No. 96-499, 94 Stat. 2605-2606, Congress repealed this provision and enacted a new definition of disability. See 5 U.S.C. 8337(a). H.R. Rep. 96-1167, 96th Cong., 2d Sess. 206 (1980); H.R. Conf. Rep. 96-1479, 96th Cong., 2d Sess. 118-119 (1980).

place the burden of proof on the agency to establish the correctness of its decision. However, the presiding official concluded that, in enacting the burden of proof provision in the Civil Service Reform Act of 1978 (Pub. L. No. 95-454, § 205, 92 Stat. 1128), Congress was concerned only with such adverse actions and not with disability retirement appeals. J.A. 30.

b. The presiding official also rejected petitioner's contention that his separation from his position by the Naval Support Activity established his entitlement to disability retirement benefits, explaining that the MSPB "has repeatedly made clear that a conclusion by the agency that an employee is not fit to continue satisfactory duty performance is not dispositive of the issue of whether he is totally disabled * * * so as to be eligible for a disability annuity under 5 U.S.C. 8337 from OPM" (J.A. 34). The presiding official observed that the Support Activity's decision to separate petitioner was based on reports by his personal physician that petitioner could not perform the full range of his duties, and that petitioner's supervisors did not rely on their own observations in concluding that petitioner was unable to perform his duties (J.A. 33-34).

c. Turning to the merits, the presiding official, after reviewing the reports of the various physicians who had examined petitioner, affirmed OPM's denial of disability retirement benefits (J.A. 31-40). The presiding official observed that the only reports that were completely supportive of petitioner were from Dr. Allen, petitioner's personal physician (J.A. 34). The presiding official found these reports unpersuasive for several reasons. First, he noted that although Dr. Allen had stated that petitioner had uncontrollable coughs (J.A. 34), the "record disclose[d] a definite lack of evidence" that petitioner's co-workers and supervisors had observed such symptoms —a factor the presiding official deemed significant because those persons regularly were in petitioner's presence during duty hours (J.A. 33, 39). Second, the pre-

siding official noted that a number of physical findings based on chest x-rays and other tests that were submitted with Dr. Allen's reports did not indicate substantially abnormal conditions (J.A. 34-35).

The presiding official also discussed the findings of Drs. Epstein and Levine, two other physicians who had examined petitioner. Dr. Epstein concluded, after reciting the results of his examination of petitioner's chest and lungs in February 1980, that there was "no evidence of either restrictive or obstructive disease" and that petitioner's condition was essentially a "chronic type of sensitivity bronchitis superimposed on a basically anxious personality type" (J.A. 36, 37). In light of the lack of evidence that others had observed symptoms, the presiding official held that Dr. Epstein's conclusions, which were supported by appropriate medical findings, were entitled to more weight than those of Dr. Allen (J.A. 39). Moreover, Dr. Epstein's conclusions were reinforced by those of Dr. Levine, who found that petitioner did not have "any disability relating to his physical conditioning" and "certainly [did] not have any pulmonary physiological disability" (J.A. 39). Against this background, the presiding official held that petitioner had not established by a preponderance of the evidence that he was totally disabled (J.A. 40).

4. Petitioner filed a petition for review of the MSPB decision in the United States Court of Claims on June 10, 1981 (J.A. 42-44). On October 1, 1982, the effective date of the Federal Courts Improvement Act of 1982 (FCIA) (Pub. L. No. 97-164, 96 Stat. 25 *et seq.*), the Court of Claims was abolished and the instant case was transferred to the docket of the newly established United States Court of Appeals for the Federal Circuit (J.A. 45). The court of appeals, sitting en banc, then granted the government's motion to dismiss the appeal, concluding that judicial review of decisions by OPM and the MSPB

on questions of disability in civil service retirement cases is barred by 5 U.S.C. 8347(c) (see J.A. 46-60).[3]

Section 8347(c) provides that OPM's decisions concerning questions of disability and dependency under the civil service retirement program "are final and conclusive and are not subject to review," except for the administrative review by the MSPB that is expressly authorized by 5 U.S.C. 8347(c) and (d). The court of appeals found it "difficult to conceive of a more clear-cut statement of congressional intent to preclude review" (J.A. 47). The court also noted that Congress in 1980 had enacted a single narrow exception to this preclusion of review. 5 U.S.C. 8347(d)(2) allows an employee to obtain judicial review in the Federal Circuit pursuant to 5 U.S.C. 7703 if the MSPB finds him disabled on the basis of his mental condition in a case in which the agency, rather than the employee, has filed the application for disability retirement benefits. In the court's view, this exception provided compelling evidence that Congress intended to foreclose a right of judicial review on questions of disability in all other cases. Because petitioner did not fall within this limited exception, the court held that judicial review was not available (J.A. 48-50).

The court of appeals recognized that its predecessor, the Court of Claims, had held in *Scroggins* v. *United States*, 397 F.2d 295, cert. denied, 393 U.S. 952 (1968), and other decisions ~~brought~~ under the Tucker Act (28

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[3] Because the court dismissed the appeal on this ground, it did not address the government's contention that the court of appeals did not have subject matter jurisdiction over the case under 28 U.S.C. 1295(a)(9) (J.A. 46). The government had argued that 5 U.S.C. 7703 and 28 U.S.C. 1295(a)(9), which provide for a direct appeal to the Federal Circuit from MSPB decisions in adverse action and similar cases, do not confer jurisdiction on the Federal Circuit to review MSPB decisions in civil service retirement cases, and that petitioner's suit to recover a retirement annuity therefore could be brought only in the Claims Court under the Tucker Act, 28 U.S.C. 1491 (Gov't Mot. to Dismiss 2-12).

U.S.C. 1491) that, notwithstanding the finality clause in 5 U.S.C. 8347(c), the Court of Claims could set aside a Civil Service Commission decision on a question of disability where there had "been a substantial departure from important procedural rights, a misconstruction of the governing legislation, or some like error going to the heart of the administrative determination" (J.A. 50-51, quoting 397 F.2d at 297). The court explained, however, that those decisions dealt with retirement that was forced by the agency, rather than a voluntary application for retirement by the employee, as in this case (J.A. 51-52). The court further explained that if *Scroggins* and its Court of Claims progeny were read to hold that 5 U.S.C. 8347(c) leaves room for judicial review of voluntary disability retirement claims, those decisions "to that extent would have to be viewed as wrongly decided and overruled" (J.A. 52). In the court's view, to hold that MSPB decisions on disability questions generally are subject to judicial review pursuant to 5 U.S.C. 7703 "would be to render superfluous" Congress's action in enacting 5 U.S.C. 8347(d)(2) in 1980 (J.A. 58).

Judge Nichols filed a concurring opinion (J.A. 61-70). He stressed that in *United States* v. *Erika, Inc.*, 456 U.S. 201 (1982), this Court had reversed a Court of Claims decision that had employed the rationale of *Scroggins* to permit review of a claim for benefits under Part B of the Medicare Program, notwithstanding Congress's preclusion of review of the amount of benefits under Part B (see *Erika, Inc.* v. *United States*, 634 F.2d 580, 587 (Ct. Cl. 1980)). Judge Nichols reasoned that this Court's decision in *Erika* indicated that the express bar in 5 U.S.C. 8347(c) to judicial review of MSPB decisions on questions of disability likewise could not be avoided under the *Scroggins* rationale permitting review of legal or procedural, but not factual, issues (J.A. 66-68).

Judge Nies also filed a concurring opinion (J.A. 71). She was of the view that all judicial review on questions of disability is "clearly precluded" by 5 U.S.C. 8347(c)

and, in addition, that no aspect of a decision denying an application for retirement benefits could be reviewed directly in the Federal Circuit pursuant to 5 U.S.C. 7703, except in involuntary mental disability retirement cases covered by 5 U.S.C. 8347(d)(2) (J.A. 71).

Four judges dissented, concluding that review of voluntary disability retirement claims should be available under the *Scroggins* formula notwithstanding the preclusion of review in 5 U.S.C. 8347(c) (J.A. 72-85).

SUMMARY OF ARGUMENT

I

The United States Court of Appeals for the Federal Circuit does not have jurisdiction under 28 U.S.C. 1295(a)(9) to entertain direct appeals from Merit Systems Protection Board decisions in civil service retirement cases. As relevant here, 28 U.S.C. 1295(a)(9) provides that the Federal Circuit shall have jurisdiction of certain appeals from final decisions of the MSPB pursuant to 5 U.S.C. 7703(b)(1). Section 7703(b)(1) was enacted in the Civil Service Reform Act of 1978 as part of a comprehensive revision of the procedures for administrative and judicial review of adverse actions and similar personnel measures taken by an agency against an employee on the ground of misconduct or substandard performance. It was settled prior to enactment of the Civil Service Reform Act that the hearing and appeal rights applicable to adverse actions did not apply to retirement cases, and there is no indication that Congress intended to alter that arrangement in the 1978 legislation. Claims for retirement benefits instead must be brought under the Tucker Act in the Claims Court or a district court.

A number of factors support this conclusion. First, in 1980, Congress expressly authorized judicial review pursuant to 5 U.S.C. 7703 in one narrow category of retirement cases: those in which the MSPB, acting on an

agency-filed application, finds an employee to be disabled based on his mental condition. 5 U.S.C. 8347(d)(2). This makes clear that when Congress has intended retirement cases to be covered by 5 U.S.C. 7703(b)(1), it has expressly so provided. Second, the language of 5 U.S.C. 7703 indicates that it was not designed to permit applicants for retirement benefits to obtain direct review in the court of appeals. Under 5 U.S.C. 7703(a), only an "employee or applicant for employment" is granted a right of judicial review. By contrast, the category of individuals whose rights are affected by the retirement program is far broader and includes many persons—*e.g.*, Members of Congress, former employees, annuitants and survivors—who are neither employees nor applicants for employment. Third, the procedures in 5 U.S.C. 7701 governing administrative appeals to the MSPB of adverse actions and other personnel measures, which must be read in conjunction with 5 U.S.C. 7703(b)(1), are clearly inapplicable to retirement cases. Finally, the legislative history of the Civil Service Reform Act discusses 5 U.S.C. 7703(b)(1) only in connection with personnel actions specifically addressed by that Act and reflects no intent to grant a right of direct appeal in retirement cases.

II

Even if the Court concludes that the Federal Circuit has subject matter jurisdiction under 5 U.S.C. 7703(b)(1) and 28 U.S.C. 1295(a)(9) over civil service retirement cases generally, judicial review in this case nevertheless is barred by 5 U.S.C. 8347(c). That section provides that OPM's decisions on questions of disability "are final and conclusive and are not subject to review," except for *administrative* review by the MSPB under 5 U.S.C. 8347(d)(1). Petitioner sought in the court of appeals to have the MSPB's decision set aside on the ground that it was not supported by substantial evidence, but he now appears to concede that judicial review of

the factual basis of the MSPB's decision is precluded. He contends, however, that the court of appeals may review the MSPB's decision to determine whether it committed an error of law or procedure. This contention is plainly wrong.

Section 8347(c) on its face does not distinguish among the grounds on which review may be sought. It broadly bars all judicial review of administrative "decisions" on "questions" of disability "arising under" the retirement subchapter. This language plainly encompasses a question of interpretation of any provision of that subchapter that has a bearing on the determination of disability. Moreover, 5 U.S.C. 8347(c) accords finality not to "findings" of fact, but to administrative "decisions"—a term that connotes the judgment of an adjudicatory body that resolves all issues in dispute, legal as well as factual. Petitioner has cited nothing in the sparse legislative history of 5 U.S.C. 8347(c) to suggest that Congress did not mean what it said. This construction of 5 U.S.C. 8347(c) also is consistent with the scope of the parallel statutory preclusions of judicial review in 5 U.S.C. 8128 (b), applicable to federal workers' compensation benefits, and 38 U.S.C. 211(a), with respect to veterans' benefits. See *Johnson* v. *Robison*, 415 U.S. 361, 367-373 (1974). Finally, 5 U.S.C. 8347(d)(2) expressly authorizes judicial review of questions of law and procedure in cases of agency-filed applications based on mental disability. This indicates that Congress intended to bar such review in all other circumstances.

Petitioner nevertheless argues that judicial review should be available under the former Court of Claims' so-called "*Scroggins* formula," which permitted a court to set aside an administrative decision on a question of disability "where there has been a substantial departure from important procedural rights, a misconstruction of the governing legislation, or some like error 'going to the heart of the administrative determination.'" *Scroggins* v. *United States*, 397 F.2d 295, 297, cert. denied, 393 U.S.

952 (1968) (quoting *Gaines* v. *United States*, 158 Ct. Cl. 497, 502, cert. denied, 371 U.S. 936 (1962)). The Federal Circuit properly rejected that approach. The "*Scroggins* formula" has no basis in the text of 5 U.S.C. 8347(c), and the Court of Claims in fact never attempted to find such a basis. The quoted language was originally taken verbatim from a decision in a retirement case in which 5 U.S.C. 8347(c) did not even apply, and it then was repeated in subsequent Court of Claims' opinions without further analysis. Moreover, the validity of the *Scroggins* formula was seriously undermined by this Court's decision in *United States* v. *Erika, Inc.*, 456 U.S. 201 (1982).

It also is significant that *Scroggins* and related decisions involved agency-filed applications based on mental disability. Congress in 1980 specifically addressed the unique problems in such cases—which are akin to adverse actions—by creating a narrow exception to 5 U.S.C. 8347(c) that permits judicial review pursuant to 5 U.S.C. 7703(b)(1). But Congress did not authorize review of other disability determinations. Nor did Congress reenact the preclusion of review in 5 U.S.C. 8347(c) in 1980, such that it could be thought to have incorporated the now-discredited *Scroggins* construction into the statutory language.

ARGUMENT

This case presents two separate questions. The first is whether the United States Court of Appeals for the Federal Circuit has subject matter jurisdiction under 28 U.S.C. 1295(a)(9) to entertain direct appeals from decisions of the Merit Systems Protection Board in civil service retirement matters generally, or whether, as we argue in Point I, an action instead must be brought in the first instance in the Claims Court or a federal district court under the Tucker Act to recover payments of retirement benefits allegedly owed. If the Court concludes that the court of appeals does not have jurisdiction over such cases under 28 U.S.C. 1295(a)(9), the judgment

below dismissing the appeal for lack of jurisdiction (J.A. 60) should be affirmed on that ground or the case should be transferred to the Claims Court. In that event there would be no occasion for the Court to reach the question addressed in Point II: whether 5 U.S.C. 8347(c) precludes judicial review of the Office of Personnel Management's determination that petitioner is not disabled.

The court of appeals did not decide in this case whether it has jurisdiction under 28 U.S.C. 1295(a)(9) over civil service retirement cases generally. It held instead that judicial review was barred in this case in any event by 5 U.S.C. 8347(c) and dismissed the appeal on that ground. Notwithstanding the court of appeals' approach, we submit that the Court should consider the question of the court of appeals' jurisdiction under 28 U.S.C. 1295(a)(9) at the outset. If the court of appeals did not have jurisdiction under 28 U.S.C. 1295(a)(9) to entertain a direct appeal from the MSPB's decision, the case was not properly "in" the court of appeals and this Court does not have certiorari jurisdiction under 28 U.S.C. 1254(1) to review the decision below on other issues. *Nixon* v. *Fitzgerald*, 457 U.S. 731, 741-742 (1982).

Moreover, the question whether an applicant for retirement benefits may take a direct appeal to the Federal Circuit from an adverse decision by the MSPB is itself one of broad importance warranting resolution by this Court, because it affects the proper allocation of jurisdiction between the Federal Circuit on the one hand and the Claims Court and district courts on the other in *all* civil service retirement cases. After the Federal Circuit rendered its decision in this case, a divided panel of that court held that the Federal Circuit *does* have jurisdiction under 28 U.S.C. 1295(a)(9) over direct appeals from MSPB decisions in retirement cases if the applicant for retirement benefits is a former employee and if review is not barred by 5 U.S.C. 8347(c). *Bronger* v. *OPM*, No. 83-1349 (Fed. Cir. July 26, 1984). Since the Court now has the benefit of the court of appeals' views, there is no

reason to postpone consideration of the jurisdictional issue,[4] particularly since two other courts of appeals have reached a contrary conclusion. *Lancellotti* v. *OPM*, 704 F.2d 91, 95-96 (3d Cir. 1983); *Morgan* v. *OPM*, 675 F.2d 196, 198 (8th Cir. 1982). Resolution of this threshold jurisdictional issue therefore is clearly warranted.

I. THE COURT OF APPEALS FOR THE FEDERAL CIRCUIT DOES NOT HAVE JURISDICTION UNDER 28 U.S.C. 1295(a)(9) TO ENTERTAIN DIRECT APPEALS FROM MSPB DECISIONS IN CIVIL SERVICE RETIREMENT CASES

The court of appeals for the Federal Circuit does not have jurisdiction under 28 U.S.C. 1295(a)(9) to entertain direct appeals from MSPB decisions in civil service retirement cases, with one narrow exception that has no application here. 28 U.S.C. 1295(a)(9) provides that the Federal Circuit shall have jurisdiction of "an appeal from a final order or final decision of the Merit Systems Protection Board, pursuant to sections 7703(b)(1) and 7703(d) of title 5." Section 7703(b)(1) authorizes any employee or applicant for employment adversely affected or aggrieved by a final order or decision of the MSPB to petition for judicial review in the Federal Circuit, except in cases involving allegations of discrimination, which ordinarily are to be brought in district court.[5] The other judicial review provision referred to in

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[4] The Solicitor General has determined that a petition for rehearing en banc will be filed in *Bronger*, seeking review of the court's ruling on the merits but suggesting that the petition be held pending this Court's decision in this case with regard to the jurisdictional issue.

[5] 5 U.S.C. 7703(b)(2) provides that cases of discrimination shall be filed under Section 717(c) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16(c)), Section 15(c) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a(c)), or Section 16(b) of the Fair Labor Standards Act of 1938 (29 U.S.C. 216(b)) (the Equal Pay Act, 29 U.S.C. 206(d)), as applicable. The first two of those sections provide for suits to be filed in district court, and the

28 U.S.C. 1295(a)(9)—5 U.S.C. 7703(d)—permits the Director of OPM to petition the Federal Circuit for review of certain MSPB decisions and is not involved here.

As explained below, the provision in 5 U.S.C. 7703(b)(1) for an employee or applicant for employment to obtain direct review of an MSPB decision in the court of appeals was first enacted in the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111, as part of a comprehensive revision of the procedures for administrative and judicial review of adverse actions and similar measures instituted by an agency against an employee on the ground of misconduct or substandard performance. The statutory provisions then in effect for review of applications for civil service retirement benefits were distinct from those applicable to adverse actions. There is no indication in the text or legislative history of the Civil Service Reform Act and subsequent enactments that Congress intended to depart from prior practice by channeling requests for review in retirement proceedings through the new adverse action procedures, including the judicial review provisions in 5 U.S.C. 7703(b)(1) and 28 U.S.C. 1295(a)(9). The court of appeals therefore did not have jurisdiction over this case under those provisions.

A. The Civil Service Laws Have Always Provided Separate Review Mechanisms For Retirement Cases And Adverse Actions

1. *Adverse Actions And The Civil Service Reform Act*

Prior to 1978, the Lloyd-LaFollette Act (5 U.S.C. (1976 ed.) 7501) provided that an adverse action (a removal

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third provides for a suit to be filed in a court of competent jurisdiction (either the district court or the Claims Court, under the Tucker Act). The right to a trial de novo in such cases is guaranteed by 5 U.S.C. 7703(c).

or suspension without pay) could be taken against an employee in the competitive service only for such cause as would promote the efficiency of the service. That Act required the agency to furnish the employee with notice of the charges against him and an opportunity to respond. The Veterans Preference Act (5 U.S.C. (1976 ed.) 7701) in turn provided for an appeal to the Civil Service Commission from the agency's decision, but only in adverse actions taken against preference eligible employees. However, the right to an appeal and to an evidentiary hearing were extended administratively to all employees in the competitive service by Executive Order of the President and implementing Civil Service Commission regulations. See *Bush* v. *Lucas*, No. 81-469 (June 13, 1983), slip op. 19 n.30; *Arnett* v. *Kennedy*, 416 U.S. 134, 142 n.8 (1974) (opinion of Rehnquist, J.).

In the Civil Service Reform Act of 1978, Congress reenacted and revised the Lloyd-LaFollette Act's procedures governing removals and other adverse actions taken by an agency against an employee on the basis of misconduct or for other cause that would promote the efficiency of the service. 5 U.S.C. 7501-7514, 7541-7543. Congress also adopted similar procedures for removal or reductions in grade based on unacceptable performance (5 U.S.C. 4303). In each instance, Congress specifically provided for a right of appeal to the MSPB pursuant to 5 U.S.C. 7701. See 5 U.S.C. 4303(e), 7513(d), 7543(d).[6]

Section 7701, which replaced and expanded upon the Veterans Preference Act, provides that "[a]n employee, or applicant for employment," may submit an appeal to the MSPB from any action by an agency that is appealable to the MSPB by law or regulation. 5 U.S.C. 7701(a). Section 7701 confers on the appellant in such a case the statutory right to have an evidentiary hearing for which

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[6] The MSPB assumed the adjudicatory functions of the former Civil Service Commission in 1978. See 5 U.S.C. 1205(a)(1); Reorg. Plan No. 2 of 1978, Pt. I, 92 Stat. 3783, *reproduced at* 5 U.S.C. 1101 note.

a transcript will be kept and to be represented by an attorney or other representative (5 U.S.C. 7701(a)(1) and (2)) and provides for the payment of attorney's fees in certain circumstances (5 U.S.C. 7701(g)). Under 5 U.S.C. 7701(c), the agency's decision must be sustained by the MSPB if it is supported by a preponderance of the evidence[7]—which has the effect of placing the burden of proof on the agency—unless there was harmful error in the application of the agency's procedures or the decision was based on a prohibited personnel practice or was not in accordance with law.

Under 5 U.S.C. 7703(a)(1), "[a]ny employee or applicant for employment" adversely affected by a final decision of the MSPB may obtain judicial review of that decision. Section 7703(b)(1) provides that, except in discrimination cases (see page 13 & note 5, *supra*), such review shall be by a petition for review in the Federal Circuit. The court of appeals may set aside the MSPB's decision if it was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; obtained without following applicable procedures; or "unsupported by substantial evidence" in the record. 5 U.S.C. 7703(c). The provision for direct review in the court of appeals was intended to result in more consistent decisions than previously had resulted when employees challenged adverse actions in the district courts (see, *e.g.*, *Service* v. *Dulles*, 354 U.S. 363 (1957))[8] and to eliminate an unnecessary layer of judicial review by the district courts, since review is on the basis of the administrative

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[7] An agency's action taken on the basis of unacceptable performance must be sustained if supported by substantial evidence rather than a preponderance of the evidence. 5 U.S.C. 7701(c).

[8] Suits for back pay also could be brought in the Court of Claims under the Tucker Act, 28 U.S.C. 1491. See *United States* v. *Testan*, 424 U.S. 392, 402 (1976); *United States* v. *Wickersham*, 201 U.S. 390 (1906).

record. S. Rep. 95-969, 95th Cong., 2d Sess. 52, 62-64 (1978).[9]

2. *The Civil Service Retirement Program*

The retirement chapter of the civil service laws (ch. 83, 5 U.S.C. 8301-8348) traditionally has contained procedures for adjudication and review of disputed claims that are distinct from those applicable to adverse actions. Prior to the division of responsibilities between OPM and the MSPB in 1978, all administrative responsibilities for the retirement program were vested in the Civil Service Commission. 5 U.S.C. (1976 ed.) 8347(a). The Commission was charged with prescribing application forms and regulations for that purpose and with adjudicating all claims for benefits under the program. 5 U.S.C. (1976 ed.) 8347(a) and (b). The latter responsibility included the determination of all issues that might bear on a claim for benefits, including whether the employee had completed the requisite number of years of service, the amount of the annuity due, and (where the claim was based on disability) whether the employee was disabled. An administrative decision under the retirement program affecting the rights of an individual then could be appealed by that individual within the Civil Service Commission. 5 U.S.C. (1976 ed.) 8347(d). It was well

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[9] As originally enacted, Sections 205 and 206 of the Civil Service Reform Act (92 Stat. 1143-1144) permitted judicial review of an MSPB decision either in the Court of Claims in a suit for back pay under the Tucker Act or by a petition for direct review in the court of appeals for the circuit in which the petitioner resided. See 5 U.S.C. (Supp. V 1981) 7703(b)(1) and (c); 28 U.S.C. (Supp. V 1981) 2342(6); 28 U.S.C. 2343. See also note 22, *infra*. However, in Sections 127(a) and 144(1) of the Federal Courts Improvement Act of 1982 (Pub. L. No. 97-164, 96 Stat. 37-38, 45), Congress removed jurisdiction to review MSPB decisions from the regional courts of appeals and vested exclusive jurisdiction of such cases in the newly created United States Court of Appeals for the Federal Circuit. See 5 U.S.C. 7703(b)(1); 28 U.S.C. 1295(a)(9).

established prior to 1978 that the applicant had the burden of proving his entitlement to retirement benefits,[10] that an employee was not entitled to a hearing on a claim for retirement benefits, and that the procedures required by the Lloyd-LaFollette Act and Veterans Preference Act in the case of adverse actions did not apply to retirement claims.[11]

There was no express provision in the civil service retirement laws authorizing an individual to obtain judicial review of an adverse decision by the Civil Service Commission on a claim for retirement benefits prior to 1978, just as there is no such express authorization today with regard to most retirement claims. Nevertheless, in *Dismuke* v. *United States*, 297 U.S. 167, 169-173 (1936), the Court held that a district court had jurisdiction under the Tucker Act to entertain a monetary claim to an annuity founded on the Civil Service Retirment Act. The Court stressed that the United States "is not, by the creation of claims against itself, bound to provide a remedy in the courts" and that it "may withhold all remedy" or "provide an administrative remedy and make it exclusive, however mistaken its exercise." 297 U.S. at 171-172. In the case of the Civil Service Retirement

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[10] See, *e.g.*, *Piccone* v. *United States*, 407 F.2d 866, 873 (Ct. Cl. 1969); *Cerrano* v. *Fleishman*, 339 F.2d 929, 931 (2d Cir. 1964), cert. denied, 382 U.S. 855 (1965); *Chavez* v. *OPM*, 6 M.S.P.B. 343, 351 (1981).

[11] See, *e.g.*, *Scroggins* v. *United States*, 397 F.2d 295, 298 (Ct. Cl.), cert. denied, 393 U.S. 952 (1968); *McGlasson* v. *United States*, 397 F.2d 303, 307 (Ct. Cl. 1968) (plurality opinion); *Kleinfelter* v. *United States*, 318 F.2d 929, 932 (Ct. Cl. 1963); *Chafin* v. *Pratt*, 358 F.2d 349, 357 (5th Cir.), cert. denied, 385 U.S. 878 (1966); *United States* v. *Abbett*, 381 F.2d 609, 612 (5th Cir. 1967); *Cerrano* v. *Fleishman*, 339 F.2d 929, 931 (2d Cir. 1964), cert. denied, 382 U.S. 855 (1965); *Murphy* v. *Wilson*, 236 F.2d 737, 738 (D.C. Cir.), cert. denied, 352 U.S. 954 (1956); *Ellmore* v. *Brucker*, 236 F.2d 734, 735 (D.C. Cir.), cert. denied, 352 U.S. 955 (1956); *Smith* v. *Dulles*, 236 F.2d 739, 740 (D.C. Cir.), cert. denied, 352 U.S. 955 (1956); *Cantrell* v. *United States*, 240 F. Supp. 851, 853 (W.D.S.C. 1965), aff'd, 356 F.2d 915 (4th Cir. 1966).

Act, however, the Court concluded that Congress's grant of administrative authority to adjudicate claims was not intended to preclude the courts from ascertaining whether the claimant was entitled to an annuity as a matter of law on the basis of the undisputed or conceded facts before the agency. *Id.* at 172-173.

Subsequently, in 1956, the administrative provisions of the Civil Service Retirement Act were revised to restrict judicial review specifically with respect to determinations of disability. The new legislation provided that "[q]uestions of dependency and disability arising under [the Retirement] Act shall be determined by the [Civil Service] Commission and its decisions with respect to such matters shall be final and conclusive and shall not be subject to review." Act of July 31, 1956, § 401, 70 Stat. 758, later codified at 5 U.S.C. (1976 ed.) 8347(c).

When the Civil Service Reform Act was enacted in 1978, the only change made in the administrative provisions of the retirement chapter of Title 5 was to divide the responsibilities of the former Civil Service Commission between OPM and the MSPB. OPM was given responsibility for administering the retirement program, prescribing regulations and application forms and adjudicating claims, and the MSPB was given authority to entertain appeals from OPM's decisions in these matters. See § 906(a)(2), (3) and (9), 92 Stat. 1224-1225, amending 5 U.S.C. 8347(a), (b) and (d). These changes were characterized as "Technical and Conforming Amendments" (92 Stat. 1224), and there is no indication that any substantive changes were intended. Congress did not, for example, amend 5 U.S.C. 8347 to provide that administrative appeals in retirement cases would be heard under the newly enacted procedures in 5 U.S.C. 7701 for appeals in adverse actions and similar cases. Nor did Congress amend 5 U.S.C. 8347 to provide that an individual seeking judicial review of an adverse administrative ruling on his application for retirement benefits must

petition for review pursuant to the newly enacted 5 U.S.C. 7703.

In 1980, however, Congress did amend 5 U.S.C. 8347 (d) explicitly to provide for the application of the special procedures in 5 U.S.C. 7701 and 7703 to one particular category of civil service retirement cases: those in which OPM found the individual to be disabled in whole or in part on the basis of the individual's mental condition, but only if that finding was made pursuant to an application filed by the agency, not the employee, requesting that the employee be retired on the basis of disability. 5 U.S.C. 8347(d)(2).

B. Congress Did Not Make The Direct Appeal Procedure In 5 U.S.C. 7703 Applicable To Claims For Civil Service Retirement Benefits

Against the background of the discussion in Point A, it seems clear that 28 U.S.C. 1295(a)(9) and 5 U.S.C. 7703(b)(1) do not constitute a general grant of jurisdiction to the Federal Circuit to entertain direct appeals from decisions of the MSPB in civil service retirement cases. Congress did not intend when it enacted 5 U.S.C. 7703(b)(1) to supplant the normal procedure for judicial review of civil service retirement claims under the Tucker Act that existed prior to enactment of the Civil Service Reform Act.

1. Perhaps most significantly, Congress has demonstrated that when it intends individuals adversely affected by MSPB decisions on retirement claims to have a right of direct appeal to the court of appeals under 5 U.S.C. 7703, it has expressly so provided. Thus, in 1980, Congress amended 5 U.S.C. 8347(d) to provide for judicial review directly in the Federal Circuit pursuant to 5 U.S.C. 7703 in the narrow category of retirement cases in which the agency has filed an application for benefits based on the employee's mental condition. Pub. L. No. 96-500, 94 Stat. 2696, 5 U.S.C. 8347(d)(2). "In the

context of the statute's precisely drawn provisions," the fact that Congress expressly authorized judicial review pursuant to 5 U.S.C. 7703 in that one narrow category of retirement cases but in no others "provides persuasive evidence that Congress deliberately intended to foreclose" judicial review pursuant to 5 U.S.C. 7703 in all other cases. *United States* v. *Erika, Inc.*, 456 U.S. 201, 208 (1982). Indeed, it would have been unnecessary for Congress to authorize a direct appeal in involuntary mental disability cases in 1980 if it had already furnished a right of direct appeal in *all* retirement cases in 1978, as petitioner argues (Pet. Br. 32). See *Morgan* v. *OPM*, 675 F.2d 196, 200 (8th Cir. 1982).[12]

2. The text of 5 U.S.C. 7703 also establishes that it was not intended to apply to retirement claims, except as expressly incorporated in 5 U.S.C. 8347(d)(2). Section 5 U.S.C. 7703(a)(1) grants a right of judicial review only to an "employee or applicant for employment" adversely affected by a final order or decision of the MSPB. The same limiting phrase is repeated in other provisions of Section 7703 as well. See 5 U.S.C. 7703(a)(2) and (c).

Section 8347(d), by contrast, provides for an appeal to the MSPB from any administrative ruling on a retirement claim that affects the rights or interests of an "individual." The category of "individuals" involved in retirement matters is far broader than the category of "employees" specifically mentioned in 5 U.S.C. 7703(a).[13] The "individuals" whose rights may be affected by OPM decisions in retirement matters, but who are not "em-

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[12] The legislative history of the 1980 amendments to 5 U.S.C. 8347 indicates that Congress believed that it was furnishing a new right of direct appeal. See S. Rep. 96-1004, 96th Cong., 2d Sess. 2, 4-5, 6 (1980); H.R. Rep. 96-1080, 96th Cong., 2d Sess. 3, 5, 6, 8 (1980); 126 Cong. Rec. 29700 (1980) (remarks of Sen. Pryor).

[13] Mere applicants for employment, the other group of persons granted a right of review under 5 U.S.C. 7703(a), obviously have no claim to retirement benefits.

ployees,"[14] include Members of Congress (5 U.S.C. 8331 (2), 8332(a)); "annuitants," who are former employees and former Members of Congress who meet the requirements for civil service annuities (5 U.S.C. 8331(9)); "survivors" and "survivor annuitants," who are individuals entitled to civil service annuities based on the service of a deceased employee, Member of Congress, or annuitant (5 U.S.C. 8331(10) and (11), 8341); and persons who are entitled to lump-sum payments from the Civil Service Retirement and Disability Fund (see 5 U.S.C. 8331(8), 8342). Thus, the language of 5 U.S.C. 7703(a)(1) simply is not suited to furnishing a right of judicial review in the broad category of claims that arise under the civil service retirement program. This incongruity is significant, because "[j]urisdictional statutes are to be construed 'with precision and fidelity to the terms by which Congress has expressed its wishes'" (*Bread Political Action Committee* v. *FEC*, 455 U.S. 577, 580-581 (1982), quoting *Palmore* v. *United States*, 411 U.S. 389, 396 (1973)). See also *Heckler* v. *Edwards*, No. 82-874 (Mar. 21, 1984), slip op. 6.

It is true that 5 U.S.C. 7703(b)(1) itself does not contain the phrase "employee or applicant for employment"; it simply states that, except in discrimination cases addressed by 5 U.S.C. 7703(b)(2), a petition for review of an MSPB decision shall be filed in the Federal Circuit. But there is no indication that Congress thereby intended implicitly to confer a right of direct appeal under 5 U.S.C. 7703(b)(1) to persons other than the employees and applicants who are explicitly granted a right of judicial review by 5 U.S.C. 7703(a)(1). Instead, 5 U.S.C. 7703(b)(1) appears to be nothing more than a venue provision that identifies the court in which an employee or applicant may exercise the right of judicial review conferred by 5 U.S.C. 7703(a)(1). See page 29, *infra*. It is significant in this regard that the other venue

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[14] See 5 U.S.C. 8331(1), 2105.

provision, 5 U.S.C. 7703(b)(2), also is necessarily limited to employees and applicants even though it likewise does not so state, because the antidiscrimination statutes under which an action may be brought in district court under that paragraph all are limited to employees and applicants for employment. See 29 U.S.C. 215, 216(b), 633a(a); 42 U.S.C. 2000e-16(a).

The Federal Circuit in *Bronger* v. *OPM*, *supra*, agreed that Section 7703(a)(1) identifies the persons who may file a petition for review under Section 7703(b)(1)—namely, employees and applicants for employment. Slip op. 9. See also *Gilman* v. *OPM*, No. 84-764 (Fed. Cir. Sept. 12, 1984), slip op. 3-4. The panel in *Bronger* nevertheless held that it had jurisdiction under 5 U.S.C. 7703(b)(1) over the retirement claim there at issue on the ground that the individuals involved (former air traffic controllers who were separated from their positions because they had participated in an illegal strike) could be regarded as "employees." In contrast, the panel in *Gilman* held that a direct appeal to the Federal Circuit did *not* lie under 28 U.S.C. 1295(a)(9) and 5 U.S.C. 7703(b)(1) because the applicant in that case—who was claiming benefits as the surviving spouse of a deceased civil service annuitant—was not and never was an employee. Her suit therefore should have been brought in the Claims Court under the Tucker Act. There is no indication, however, that Congress intended to provide such different avenues of judicial review under the same overall retirement program depending upon the status of the applicant.

The panel in *Bronger* reasoned that it would be illogical to conclude that because the air traffic controllers had been effectively removed from their jobs, they became "nonemployees" who could not seek judicial review pursuant to 5 U.S.C. 7703 of the denial of their applications for retirement benefits. In the panel's view, that rationale also would deprive the Federal Circuit of jurisdiction under 5 U.S.C. 7703(b)(1) in adverse action cases in which the individual had been removed from his posi-

tion by the time he filed a petition for judicial review of the removal. Slip op. 10-11. But it is the panel's reasoning in *Bronger* that is illogical. The text and legislative history of 5 U.S.C. 7703(a) and (b) make unambiguously clear that they were specifically intended to govern removals and other adverse actions. Those measures are taken against an individual when he is an "employee," because of his conduct as such. The individual obviously does not lose his right of appeal if he is deprived of his status as an employee while he seeks review of the adverse action.

By contrast, OPM decisions on claims for retirement benefits affect numerous individuals who were not "employees" at the time the challenged actions occurred or the administrative proceedings were instituted. That was the case here and in *Bronger*, for in each instance the individual did not file his application for retirement benefits until after he had been separated from his position. See page 2, *supra*. Moreover, the court in *Bronger* did not offer a bright-line test, which is essential in fashioning jurisdictional rules. See *Heckler v. Edwards*, slip op. 6. Although the applications for retirement benefits by the air traffic controllers were reasonably contemporaneous with and related to their removal, issues under the retirement program involving many former employees have no such nexus. That would be true, for example, of questions concerning the rights of annuitants who have long since left their positions. These factors strongly indicate that Congress did not intend 5 U.S.C. 7703(a) and (b)(1) to apply to *any* retirement cases.[15]

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[15] The remainder of the reasoning in *Bronger* is equally unpersuasive. First, the panel relied on a presumption in favor of judicial review. Slip op. 8. But that presumption has no relevance here, because the question is only *which* court has jurisdiction. We concede that the Claims Court does have jurisdiction to review the MSPB's decision in a retirement case in a suit under the Tucker Act (except to the extent review is barred by 5 U.S.C. 8347(c)). Second, the panel expressed the view that Congress's explicit au-

3. The conclusion that 5 U.S.C. 7703(b)(1) does not apply to retirement claims also is supported by the text of the administrative appeal provision in 5 U.S.C. 7701. Section 7703(b) must be read in conjunction with Section 7701, because together they constitute a single integrated procedure by which individuals adversely affected by various personnel actions initiated by federal agencies may challenge those actions.[16] Section 7701(a) provides for a right of administrative appeal to the MSPB only by "[a]n employee, or applicant for employment," and thus likewise by its terms does not apply to the broad category of retirement appeals that may be

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thorization in 5 U.S.C. 8347(d)(2) for judicial review pursuant to 5 U.S.C. 7703 in cases of agency-filed applications for retirement benefits based on mental disability actually "bolsters" the conclusion that Congress intended to authorize a direct appeal pursuant to 5 U.S.C. 7703 in other retirement cases as well, even though Congress did not so specify. Slip op. 7-8. As we have already explained (see pages 20-21, *supra*), however, Congress's express incorporation of 5 U.S.C. 7703 in that one instance but in no others leads to precisely the opposite conclusion.

The panel in *Bronger* did not dispute OPM's contention that the legislative history of the Civil Service Reform Act contains no mention of judicial review in civil service retirement cases and that it focuses instead on judicial review of adverse actions. Slip op. 6-7, 11. The panel attempted to discount the relevance of that legislative history by noting that the question of entitlement to retirement benefits involved in *Bronger* was intimately bound up with the circumstances of the applicants' removal from their positions. Slip op. 11-12. That reasoning is erroneous, however, because the employees were not actually challenging their removal. Reliance on that peculiar factual aspect of *Bronger* also would not furnish a clear test of jurisdiction in retirement cases generally. Moreover, the Federal Circuit has not appeared to require such a nexus between an adverse action and the retirement claim in its unpublished opinions in two cases decided since *Bronger*. See *Biggs* v. *OPM*, No. 84-1141 (Aug. 1, 1984); *Viray* v. *OPM*, No. 83-1088 (Aug. 28, 1984).

[16] The term "personnel action" is defined in 5 U.S.C. 2302(a)(2) to include various actions affecting employees or former employees seeking to resume their duties, but does not include decisions in retirement cases.

taken under 5 U.S.C. 8347(d) by individuals other than "employees." A construction of 5 U.S.C. 7701 that excludes retirement claims also is consistent with the firmly settled practice prior to 1978, under which the Civil Service Commission and the courts had uniformly held that retirement appeals were not covered by the procedures applicable to adverse actions under the Lloyd-LaFollette and Veterans Preference Acts. See pages 17-18, *supra*.

There is no indication that Congress intended to eliminate the distinction between the two procedures when it enacted the Civil Service Reform Act of 1978. To the contrary, the indications are that when Congress intended appeals to be taken to the MSPB under the special procedures in 5 U.S.C. 7701—including the statutory requirements of an evidentiary hearing, the placing of the burden of proof on the agency, and allowance of attorney's fees—it expressly so provided. See 5 U.S.C. 3593(c)(2), 3595(c), 4303(e), 7513(d), 7543(d). All of those sections pertain to adverse personnel decisions, which are quite different in nature from claims for retirement annuities. Congress's failure to make a comparable reference to the adverse action procedures of 5 U.S.C. 7701 in the civil service retirement statute—even though it did amend 5 U.S.C. 8347(d) to authorize an individual adversely affected by an OPM decision on a retirement claim to appeal to the MSPB—furnishes a compelling indication that Congress did not intend to apply the new provisions of 5 U.S.C. 7701 to retirement appeals. *United States* v. *Erika, Inc.*, 456 U.S. at 208; *Lehman* v. *Nakshian*, 453 U.S. 156, 167-168 (1981).[17]

Consistent with this view, the courts of appeals have held that appeals to the MSPB in retirement cases are

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[17] The legislative history discusses the appeals process and 5 U.S.C. 7701 only in connection with adverse actions and similar personnel measures, without any reference to retirement claims. See H.R. Rep. 95-1403, 95th Cong., 2d Sess. 4-5, 21-23 (1978); S. Rep. 969, *supra*, at 9-10, 24, 40, 42-45, 51-62; H.R. Conf. Rep. 95-1717, 95th Cong., 2d Sess. 137-139 (1978).

taken pursuant to 5 U.S.C. 8347(d)(1) under whatever procedures are "prescribed by the Board" (*ibid.*), not pursuant to 5 U.S.C. 7701.[18] Congress's decision when it enacted the Civil Service Reform Act to maintain the distinction between adverse actions and retirement claims for purposes of *administrative* review strongly reinforces the conclusion that Congress did not sub silentio merge the two together for purposes of *judicial* review under 5 U.S.C. 7703(b)(1).[19]

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[18] See *Banda* v. *OPM*, 727 F.2d 471, 472-473 (5th Cir. 1984); *Williams* v. *OPM*, 718 F.2d 1553, 1554 (Fed. Cir. 1983); *Frank* v. *OPM*, 727 F.2d 1117 (1983), cert. denied, No. 83-5914 (Mar. 19, 1984); *Dawson* v. *MSPB*, 712 F.2d 264, 269 & n.5 (7th Cir. 1983); *Scarborough* v. *OPM*, 723 F.2d 801, 809-811 (11th Cir. 1984). See also *Frazier* v. *MSPB*, 672 F.2d 150, 154-155 (D.C. Cir. 1982); but cf. *Turner* v. *OPM*, 707 F.2d 1499, 1501 (D.C. Cir. 1983). The MSPB at one time took the position that appeals to it from OPM decisions on retirement claims were taken pursuant to 5 U.S.C. 7701. See *Chavez* v. *OPM*, 6 M.S.P.B. 343, 348-349 (1981); cf. 5 C.F.R. 1201.3(a)(6). However, in *Cheeseman* v. *OPM*, No. PH 08318310675 (June 5, 1984), slip op. 10-11, the MSPB denied an award of attorney's fees on the basis of the Federal Circuit's decision in *Williams* v. *OPM*, which held that retirement appeals are not brought under 5 U.S.C. 7701.

[19] The conclusion that Congress, when it enacted the Civil Service Reform Act in 1978, did not intend to include civil service retirement appeals under the new adverse action appeal procedures in 5 U.S.C. 7701 is confirmed by the fact that two years later, Congress amended 5 U.S.C. 8347(d) specifically to require that the procedures in 5 U.S.C. 7701 be followed in appeals to the MSPB in one particular category of retirement cases: those in which OPM, acting on an agency-filed application, found the employee disabled based on his mental condition. 5 U.S.C. 8347(d)(2). These are the same cases for which Congress also specified that judicial review would be pursuant to 5 U.S.C. 7703. Congress's express provision that the formal procedures in 5 U.S.C. 7701 be utilized in the one category of cases clearly indicates that Congress did not intend Section 7701 to govern other retirement cases. *United States* v. *Erika, Inc.*, 456 U.S. at 208.

Moreover, the legislative history of the 1980 amendment in fact shows that Congress believed that administrative appeals in re-

4. There also is no indication in the legislative history of the Civil Service Reform Act that Congress intended 5 U.S.C. 7703(b)(1) to apply to civil service retirement cases. The House Report discusses the judicial review provision only in the context of adverse actions and similar personnel measures and describes it as applicable to "decisions of the Board appealed by an employee or applicant for employment" (H.R. Rep. 95-1403, 95th Cong., 2d Sess. 22-23 (1978))—language that, as we have explained, does not adequately describe the category of persons who may take an appeal to the MSPB on retirement matters.

Similarly, the Senate Report states that the provision of the Senate bill that was identical to 5 U.S.C. 7703(a)(1) as finally enacted "authorizes an employee or applicant adversely affected by a final order or decision of the Board to seek judicial review" (S. Rep. 95-969, 95th Cong., 2d Sess. 62 (1978)).[20] The report also states that

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tirement cases were not then governed by 5 U.S.C. 7701. See H.R. Rep. 96-1080, 96th Cong., 2d Sess. 3, 5, 8 (1980); S. Rep. 96-1004, 96th Cong., 2d Sess. 2, 3, 5 (1980); 126 Cong. Rec. 29700 (1980) (remarks of Sen. Pryor); *id.* at 14816 (remarks of Rep. Corcoran).

[20] Petitioner relies (Pet. Br. 32) on a statement in the next sentence of the Senate Report that "[t]he section applies to judicial review of *all* final orders or decisions of the Board" (S. Rep. 95-969, *supra*, at 62 (emphasis added by petitioner)). This passage does not suggest that Section 7703(b)(1) applies to appeals in retirement cases. The Senate Report language quoted by petitioner refers to the provision eventually enacted as 5 U.S.C. 7703(a)(1), which is expressly limited to appeals by employees and applicants for employment, and therefore does not embrace all retirement appeals.

Similarly, although the reports on the Federal Courts Improvement Act of 1982 state that the newly created Federal Circuit would have jurisdiction over "all" or "any" appeals from the MSPB, they also state that jurisdiction over such appeals was then in the Court of Claims and the regional courts of appeals under 5 U.S.C. 7703(b)(1) and 7703(d). See H.R. Rep. 97-312, 97th Cong., 1st Sess. 18, 42-43 (1981); S. Rep. 97-275, 97th Cong., 1st Sess. 21 (1981). There accordingly is no indication that Congress intended to expand the category of cases that was covered

the provision of the bill that corresponds to 5 U.S.C. 7703(b) as finally enacted "specifies the forum in which an employee or applicant may bring the review proceeding" (S. Rep. 95-969, *supra*, at 63), thereby making clear that Section 7703(b)(1) is simply a venue provision and that the absence of an explicit reference to employees or applicants was not intended to broaden the right of direct appeal to the court of appeals. Finally, the Senate Report notes that "[s]ince U.S. District Courts are specifically given jurisdiction over life and health insurance cases under [5 U.S.C. 8715 and 8912], these provisions are not amended either" (S. Rep. 95-969, *supra*, at 63). This statement reflects a congressional intent not to disturb existing jurisdictional arrangements under federal employee benefit programs generally. Such programs were far removed from the central focus of the pertinent provisions of the Civil Service Reform Act, which was on adverse actions and similar personnel measures.[21]

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by 5 U.S.C. 7703(b)(1) as enacted in 1978. Moreover, as the decision in *Gilman* makes clear, the Federal Circuit has not taken jurisdiction over "all" MSPB decisions. Petitioner contends (Pet. Br. 36) that if the Federal Circuit does not have jurisdiction under 5 U.S.C. 7703(b)(1) and 28 U.S.C. 1295(a)(9) to entertain a direct appeal from an MSPB decision in a civil service retirement case, the result would be to undermine the uniformity Congress intended when it established the Federal Circuit. Petitioner overlooks the fact that if claimants seeking retirement benefits bring an action under the Tucker Act in the Claims Court or district court, any appeal would be taken to the Federal Circuit (28 U.S.C. 1295(a)(2) and (3)), consistent with the goal of uniformity under the FCIA.

[21] The Senate Report also sheds light on 5 U.S.C. 7703(a)(2), which provides that the MSPB shall be the named respondent in any proceeding for judicial review "unless the employee or applicant for employment seeks review of a final order or decision issued by the Board under section 7701"; in that event the "agency responsible for taking the action" shall be the named respondent. Section 7703(a)(2) obviously contemplates that some orders or decisions rendered by the MSPB in cases that were not appealed to it pursuant to 5 U.S.C. 7701(a) are nevertheless subject to

5. For the foregoing reasons we believe that the Federal Circuit did not have jurisdiction under 28 U.S.C. 1295(a)(9) to entertain a direct appeal from the MSPB's decision affirming OPM's denial of petitioner's application for disability retirement benefits. Petitioner instead was required to bring an action under the Tucker Act for a money judgment in the amount of retirement benefits allegedly owing. 28 U.S.C. 1491(a)(1), 1346(a)(2). In fact, in his petition for review filed in the Court of Claims on June 8, 1981, petitioner invoked that court's Tucker Act jurisdiction in addition to asserting that judicial review was available under 5 U.S.C. 7703, which at that time permitted a petition for review to be filed in either the Court of Claims or a regional court of appeals (J.A. 44; see 5 U.S.C. (Supp. IV 1980) 7703(b)(1)).

After the October 1, 1982 effective date of the Federal Courts Improvement Act, the instant case was transferred to the Federal Circuit (J.A. 45) along with all other MSPB cases pending in the Court of Claims,

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judicial review under 5 U.S.C. 7703(b). However, this additional category of cases contemplated by 5 U.S.C. 7703(a)(2) does not include administrative appeals in civil service retirement cases, because Section 7703(a)(2) is expressly limited to judicial review in a proceeding brought by an "employee or applicant for employment." See also S. Rep. 95-969, *supra*, at 62.

The Senate Report makes clear that the decisions of the MSPB, other than those issued under 5 U.S.C. 7701, that Congress had in mind in permitting a direct appeal to the Federal Circuit pursuant to 5 U.S.C. 7703 are those over which the MSPB has *original* jurisdiction under the new procedures adopted in the Civil Service Reform Act, such as a decision imposing a fine or other disciplinary sanction against an employee in an action brought before the MSPB by the Special Counsel (see 5 U.S.C. 1207) or declining the Special Counsel's request to impose a permanent stay of a personnel action (5 U.S.C. 1208). See S. Rep. 95-969, *supra*, at 62. See also 5 U.S.C. 7521 (adverse action proceedings against administrative law judges conducted before the MSPB). There is no indication that Congress intended to permit judicial review directly in the court of appeals in retirement cases, which are not appealed to the MSPB pursuant to the special procedures in 5 U.S.C. 7701, are not within the MSPB's original jurisdiction, and do not concern a subject area otherwise addressed by the Civil Service Reform Act.

presumably on the premise that 5 U.S.C. 7703(b)(1) authorized a direct appeal to the Federal Circuit from MSPB decisions in retirement cases. That premise was incorrect, as we have shown. Insofar as petitioner brought his suit in the Court of Claims under the Tucker Act, Section 403(d) of the FCIA (96 Stat. 58) required it to be decided by the newly created Claims Court.[22] This case, therefore, should have been assigned to the Claims Court for a decision, subject to a right of appeal to the Federal Circuit, after final judgment, pursuant to 28 U.S.C. 1295(a)(3). See *Ellis* v. *United States*, 711 F.2d 1571, 1574-1575 (Fed. Cir. 1983); *Morris Mechanical Enterprises, Inc.* v. *United States*, 728 F.2d 497, 498 (Fed. Cir. 1984), petition for cert. pending on other grounds, No. 83-1903. The court of appeals' judgment dismissing the direct appeal could be affirmed on this ground. However, because petitioner properly invoked the subject matter jurisdiction of the Court of Claims under the Tucker Act prior to the effective date of the FCIA, the Court might wish to consider vacating the judgment below and remanding the case to the court of appeals with instructions to transfer the case to the Claims Court "in the interest of justice." See 28 U.S.C. 1631.

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[22] In *Dunn* v. *United States*, 654 F.2d 64, 66-67 (1980), the Court of Claims held that 5 U.S.C. 7703(b)(1), as originally enacted in 1978, did not confer a right of review in that court independent of the right to bring an action for back pay under the Tucker Act, 28 U.S.C. 1491(a)(1). See also H.R. Rep. 97-312, 97th Cong., 1st Sess. 18 (1981); *Rosano* v. *Department of the Navy*, 699 F.2d 1315, 1316-1317 (Fed. Cir. 1983). The reference in 5 U.S.C. (Supp. III 1979) 7703(b)(1) to the filing of a petition for review in the Court of Claims appears instead to have been intended to preserve a Tucker Act suit as an avenue of judicial review in adverse action and other cases covered by that section.

II. IF THE COURT OF APPEALS DID HAVE JURISDICTION UNDER 28 U.S.C. 1295(a)(9), JUDICIAL REVIEW NEVERTHELESS IS BARRED IN THIS CASE BY 5 U.S.C. 8347(c)

Even if the Court concludes, contrary to our submission in Point I, that the court of appeals did have jurisdiction over this case under 28 U.S.C. 1295(a)(9), the court of appeals' judgment dismissing the appeal nevertheless was correct because judicial review is barred in any event by 5 U.S.C. 8347(c). Section 8347(c) provides that OPM "shall determine questions of disability and dependency arising under" the retirement program and that, "[e]xcept to the extent provided under [5 U.S.C. 8347(d)], the decisions of [OPM] concerning these matters are final and conclusive and are not subject to review." Section 8347(d)(1), in turn, permits an individual whose rights are affected by an order or action of OPM under the retirement program to appeal to the MSPB, but it does not authorize judicial review. Under the statutory scheme, then, OPM's decisions on questions of disability are "final and conclusive and are not subject to review," except for *administrative* review of OPM's decisions by the MSPB. Congress thus has explicitly foreclosed *judicial* review of an administrative decision that an applicant for civil service retirement benefits is not disabled.

In this case, petitioner's application for retirement benefits was denied by OPM and then by the MSPB because they found that he was not disabled under the statute. In the court of appeals, petitioner sought review of the MSPB's decision on two grounds, arguing that (i) the decision was not supported by substantial evidence, and (ii) the MSPB improperly placed upon him the burden of proving that he was disabled (Ct. Cl. Br. 9-12, 15-16).[23]

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[23] In addition to challenging the MSPB's decision that he was not disabled, petitioner also argued below (Ct. Cl. Br. 12-15) that the Department of the Navy violated a provision of the Federal Personnel Manual, Supplement 831-1, S10-10a(6) (Feb. 29, 1980),

Petitioner now appears to concede (see Pet. Br. 20, 26) that 5 U.S.C. 8347(c) precluded the court of appeals from reviewing the MSPB's decision to determine whether it was supported by substantial evidence. This concession is well taken. Even those courts that have concluded that judicial review of MSPB decisions on questions of disability is not entirely foreclosed by 5 U.S.C. 8347(c) have unanimously held that a court is barred from reviewing the factual or evidentiary bases of the MSPB's decisions. See *Pitzak* v. *OPM*, 710 F.2d 1476, 1478-1479 (10th Cir. 1983); *Turner* v. *OPM*, 707 F.2d 1499, 1502 (D.C. Cir. 1983); *McCard* v. *MSPB*, 702

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when it removed him from his position while his application for disability retirement benefits was pending. He renews that argument here (see Pet. Br. 3, 16-17, 39-40), but it is not properly raised in this case. That issue would be relevant only to the question whether petitioner was lawfully removed from his position. Petitioner never challenged his removal by appealing the Naval Support Activity's decision to the MSPB, even though he was informed of his right to do so. See page 2, *supra*. He cannot now collaterally attack his removal in these proceedings concerning his eligibility for civil service retirement benefits. Thus, the question whether the Naval Support Activity followed applicable procedures in removing him was not properly before the MSPB or the court of appeals in this case. Petitioner's reliance (Pet. Br. 39) on *Piccone* v. *United States*, 407 F.2d 866 (Ct. Cl. 1969), is misplaced for this reason. In *Piccone*, the employee *did* pursue his administrative remedies to challenge his removal—on the ground that it was improperly effectuated while his application for retirement benefits was pending before the Civil Service Commission—and his suit in the Court of Claims likewise challenged his removal on that ground. 407 F.2d at 868-871.

Petitioner's challenge to his removal is without merit in any event. Under Federal Personnel Manual Supplement 831-1, S10-10a(6) (Feb. 29, 1980), "[t]he agency is required to retain an employee in an active-duty status pending a decision [by OPM] on an *agency* application for disability retirement" (see Pet. Br. App. 27a) (emphasis added)). In this case, the application for retirement benefits was filed by petitioner, not his agency. Moreover, petitioner did not file his application for retirement benefits with OPM until after the effective date of his removal. See page 2, *supra*.

F.2d 978, 983 (11th Cir. 1983); *Parodi* v. *MSPB*, 690 F.2d 731, 734 (9th Cir. 1982).[24]

Petitioner nonetheless argues (Pet. Br. 18-31) that, even if judicial review of the facts is foreclosed, 5 U.S.C. 8347(c) does not preclude a court from reviewing the MSPB's decision on a question of disability for purposes of determining whether the MSPB committed an error of law or procedure in arriving at its decision. This contention has a particularly hollow ring in the context of this case. Petitioner's only remaining objection to the MSPB's decision is that, in his view, the MSPB should have placed the burden on OPM rather than on him with regard to the evidence bearing on the question of disability. That is simply an indirect way of attacking the factual or evidentiary basis of the MSPB's decision and therefore should be equally foreclosed under any view of the scope of 5 U.S.C. 8347(c). See J.A. 71 (Nies, J., concurring); *McCard* v. *MSPB*, 702 F.2d at 983. Moreover, on the merits, petitioner's position on the burden of proof issue is frivolous.[25] Putting these flaws to

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[24] Accord, *Hackett* v. *OPM*, 721 F.2d 580, 582 (6th Cir. 1983); *Campbell* v. *OPM*, 694 F.2d 305, 306-307 (3d Cir. 1982); *Chase* v. *OPM*, 695 F.2d 790, 791 (4th Cir. 1982); *Morgan* v. *OPM*, 675 F.2d 196, 197, 201 (8th Cir. 1982).

[25] As the MSPB observed in *Chavez* v. *OPM*, 6 M.S.P.B. 343, 351 & n.17, 352 (1981), in rejecting the contention petitioner now makes, it was firmly established prior to enactment of the Civil Service Reform Act of 1978 that an applicant for civil service retirement benefits had the burden of proving his entitlement (see note 10, *supra*), and there is no indication whatever in the legislative history of the Civil Service Reform Act that Congress intended to reserve that settled practice. Indeed, since the passage of the Civil Service Reform Act, the courts have uniformly held that an applicant for retirement benefits continues to bear the burden of proof. See, *e.g.*, *Parodi* v. *MSPB*, 690 F.2d at 737, 739; *McCard* v. *MSPB*, 702 F.2d at 983; *Chase* v. *OPM*, 695 F.2d at 791; cf. *Turner* v. *OPM*, 707 F.2d at 1506. In addition, as the presiding official observed in this case (J.A. 30-31), the MSPB's rule requiring the applicant to prove he is disabled is consistent with the rule for establishing entitlement to Social Security disability benefits

one side, however, petitioner's contention that 5 U.S.C. 8347(c) bars judicial review only of issues of fact is without merit.

A. 5 U.S.C. 8347(c) Expressly Precludes Judicial Review Of Decisions On Employee-Filed Disability Applications Based On Physical Condition

5 U.S.C. 8347(c) provides that OPM "shall determine questions of disability * * * arising under this subchapter" and that "the decisions of OPM concerning these matters are final and conclusive and are not subject to review," except by the MSPB. As the court of appeals observed, "[i]t is difficult to conceive of a more clear-cut statement of congressional intent to preclude review than one in which the concept of finality is thrice repeated in a single sentence" (J.A. 47).[26] Nothing in this "clear-

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(see *Mathews* v. *Eldridge*, 424 U.S. 319, 336 (1976)) and benefits under other federal programs. See also *Alton R.R.* v. *United States*, 315 U.S. 15, 25 (1942) (the "applicant carries the burden of establishing his right to the statutory grant"). The burden of proof also is properly allocated to petitioner because he has greater access to the evidence concerning his own medical condition. See *United States* v. *New York, N.H. & H.R.R.*, 355 U.S. 253, 256 n.5 (1957). Petitioner's contrary argument—that OPM bears the burden of proving the negative (*i.e.*, that he is *not* disabled)—rests on his assertion that 5 U.S.C. 7701 governs appeals to the MSPB in retirement cases. See Pet. Br. 12-14, 36-38. As we have shown (see pages 25-27, *supra*), that contention is in error.

[26] Petitioner relies (Pet. Br. 18) on the presumption that agency action is reviewable. But as this Court recently held, this presumption "is just that—a presumption," and it "may be overcome by specific language" in the statute. *Block* v. *Community Nutrition Institute*, No. 83-458 (June 4, 1984), slip op. 8. Moreover, the presumption in favor of judicial review ordinarily is applied in suits seeking review of administrative action, for which the Administrative Procedure Act (APA) itself reflects a presumption in favor of review. 5 U.S.C. 701(a)(1). As Judge Nichols observed (J.A. 62), however, this is a suit against the government seeking a monetary recovery, to which the presumption of review in APA-type suits does not apply. See 5 U.S.C. 702 (excluding suits for money damages); *United States* v. *Testan*, 424 U.S. 392, 400 (1976); *United States* v. *Mitchell*, No. 81-1748 (June 27, 1983), slip op. 10-11.

cut statement" suggests that it does not apply to issues of law. To the contrary, a question of disability "arising under" the retirement subchapter plainly includes a question concerning the proper interpretation of any provision of that subchapter relating to disability. Cf. *Heckler* v. *Ringer*, No. 82-1772 (May 14, 1984), slip op. 11-12, 16-18; *Weinberger* v. *Salfi*, 422 U.S. 749, 760-761 (1975); *id.* at 789-790, 795 (Brennan, J., dissenting). It is significant also that Section 8347(c) accords finality to the "decisions" of OPM concerning matters of disability. The term "decision" in federal law connotes a judgment of an adjudicatory body that resolves all issues in dispute, both legal and factual. See, *e.g.*, 5 U.S.C. 7703(a)(1); 28 U.S.C. 1291, 1295(a)(9); 42 U.S.C. 405(g). If Congress had intended the preclusion of review to apply only to the resolution of factual issues, it presumably would have used the conventional term "findings" rather than "decisions." Moreover, in other statutory provisions precluding review, Congress has used the term "decisions" to refer to resolutions of questions of law as well as fact.[27]

Thus, the plain language of 5 U.S.C. 8347(c) bars judicial review of both legal and factual determinations that underlie an administrative decision on a question of disability arising under the civil service retirement laws. "[A]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *CPSC* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). Petitioner has pointed to nothing in the legislative history of the 1956 Act in which Con-

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[27] See, *e.g.*, 42 U.S.C. 405(h) ("No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided"; see *Weinberger* v. *Salfi*, 422 U.S. at 759 n.6, 761-762; *id.* at 789-790 (Brennan, J., dissenting)); 38 U.S.C. 211(a) ("the decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration * * * shall be final and conclusive" and not subject to review; see *Johnson* v. *Robison*, 415 U.S. at 367-374; *Weinberger* v. *Salfi*, 422 U.S. at 761-762).

gress enacted the preclusion of review to indicate that Congress did not mean what it said. In fact, the legislative history of that Act does not shed any further light on the provision.[28]

The construction of 5 U.S.C. 8347(c) that its plain language requires also conforms to Congress's decision to bar judicial review of claims for benefits under the Federal Employees Compensation Act (FECA), 5 U.S.C. 8101 *et seq.*, which establishes a system of compensation for federal employees suffering work-related injuries. See *United States* v. *Lorenzetti*, No. 83-838 (May 29, 1984).

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[28] A finality clause similar to that now contained in 5 U.S.C. 8347(c) was first added to the Civil Service Retirement Act in 1948, but was limited to questions of dependency and disability arising under the section providing for survivorship benefits. Act of Feb. 28, 1948, ch. 84, § 11, 62 Stat. 56, amending § 12(d)(3) of the Civil Service Retirement Act of 1930. The reports on the 1948 Act do not shed any light on the scope of the preclusion of review. S. Rep. 746, 80th Cong., 1st Sess. 6-7 (1947); H.R. Rep. 888, 80th Cong., 1st Sess. 6-7 (1947). In 1956, when Congress revised the general administrative provisions of the Civil Service Retirement Act of 1930, the preclusion of review was made applicable to questions of disability and dependency arising under the entire Act, not merely its survivorship section. Act of July 31, 1956, ch. 804, § 401, 70 Stat. 759, amending § 17 of the Civil Service Retirement Act of 1930. Only the Senate bill contained provisions relating to civil service retirement (H.R. Conf. Rep. 2935, 84th Cong., 2d Sess. 32 (1956)), and the Senate Report does not discuss the preclusion provision. S. Rep. 2642, 84th Cong., 2d Sess. 13 (1956).

Petitioner contends (Pet. Br. 23) that Congress's silence on the question in the legislative history must mean that Congress could not have intended to preclude all judicial review. This Court has made clear, however, that silence in the legislative history does not overcome the plain language of a statute. *Harrison* v. *PPG Industries, Inc.*, 446 U.S. 578, 589 (1980). Moreover, contrary to petitioner's submission, the absence of legislative history on the statutory preclusion of review is neither surprising nor an indication that 5 U.S.C. 8347(c) should not be given its natural effect. The Court noted in *Johnson* v. *Robison* that the legislative history of 38 U.S.C. 211(a) also was "scant" (see 415 U.S. at 373; see also *id.* at 368-369). That provision expressly bars review of questions of law as well as fact, yet Congress evidently did not regard it as worthy of extended debate.

In 5 U.S.C. 8128(b)(1), Congress provided that the action of the Secretary of Labor in allowing or denying a claim is "final and conclusive for all purposes and with respect to all questions of law and fact" and is not subject to judicial review. The determinations that are made in the administration of FECA are similar to those arising under the civil service disability retirement program, and, indeed, a federal employee often may receive benefits under each. See 5 U.S.C. 8337(e) and (f). There accordingly is no reason to believe that Congress intended the preclusion of review in 5 U.S.C. 8347(c) to be less sweeping than that in 5 U.S.C. 8128(b).

The court of appeals' construction of 5 U.S.C. 8347(c) likewise is consistent with this Court's decision in *Johnson* v. *Robison*, 415 U.S. 361 (1974), which construed the parallel statutory bar in 38 U.S.C. 211(a) to judicial review of decisions of the Veterans Administration on applications for veterans' benefits. Section 211(a) provides that the administrative determination on questions of law and fact is "final and conclusive" and shall not be subject to review. This Court recognized in *Johnson* v. *Robison* that Congress had foreclosed judicial review of individual benefit claims because of the wide variety of medical, legal and other technical questions that often are involved and because of the need to ensure adequate and uniform resolution of these questions without expensive and time-consuming litigation. 415 U.S. at 370-373 & n.12. These same considerations underlie the bar to judicial review of the often complex medical, legal, and other questions relating to a determination of disability under the civil service retirement system.[29]

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[29] The Court held in *Johnson* v. *Robison* that 38 U.S.C. 211(a) does not bar a court from deciding the constitutionality of veterans' benefits legislation. It explained that such a constitutional challenge is not to a decision of the *Administrator*, but rather to a decision of *Congress* to create a particular statutory classification, and that the constitutionality of the statute—unlike a question of law or fact arising under it—was beyond the authority of the

Finally, Congress demonstrated in the 1980 amendments to 5 U.S.C. 8347 that when it intends to permit judicial review on questions of disability arising under the civil service retirement program, it will expressly so provide. In the 1980 amendments, Congress qualified the preclusion of review in Section 8347(c) to make it applicable "[e]xcept to the extent provided under subsection (d) of this section." In Subsection (d)(1), Congress retained the provision for administrative review by the MSPB in retirement cases generally. In a new Subsection (d)(2), Congress provided that if OPM has found an individual to be disabled "in whole or in part on the basis of the individual's mental condition, and that finding was made pursuant to an application by an

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Administrator to decide. 415 U.S. at 367-368. Similarly, in this case, the court of appeals indicated that 5 U.S.C. 8347(c) does not preclude a constitutional challenge to the civil service retirement laws (J.A. 50). Petitioner, however, does not challenge the constitutionality of any provision of those laws.

Petitioner does attempt to cast his argument that the MSPB should have placed the burden of proof on OPM in constitutional terms, contending that this allocation of the burden of proof is required by 5 U.S.C. 7701(c) or implementing MSPB regulations and that the MSPB's failure to follow these provisions in turn violated his due process rights. See Pet. Br. 12-15, 16-18, 36-38. The initial premise of petitioner's argument is incorrect. As we have explained (see pages 17-18, 25-27, *supra*), 5 U.S.C. 7701(a) does not apply to retirement appeals, and it is well settled that the applicant has the burden of proving his entitlement to retirement benefits. In any event, petitioner's attempt to convert his question of interpretation of statutes and regulations into one of constitutional dimension is pure bootstrap. If a particular regulation or statutory provision is not itself mandated by the Constitution, a violation of the provision does not rise to the level of a constitutional violation. *United States* v. *Caceres*, 440 U.S. 741, 751-752 (1979); *Board of Curators* v. *Horowitz*, 435 U.S. 78, 92 n.8 (1978). See also *Davis* v. *Scherer*, No. 83-490 (June 28, 1984), slip op. 9. The Constitution surely does not prohibit the government from placing the burden of proof on the applicant for statutory benefits. Because petitioner's "constitutional" argument is frivolous, there is no need to consider in this case whether 5 U.S.C. 8347(c) bars a due process challenge to a particular decision on a question of disability. See *Heckler* v. *Ringer*, slip op. 5 n.4.

agency for purposes of disability retirement * * *, the decision of the Board shall be subject to judicial review under [5 U.S.C.] 7703."

On judicial review under 5 U.S.C. 7703, a court may set aside the MSPB's decision if it was arbitrary or capricious, not in accordance with law, obtained without following applicable procedures, or unsupported by substantial evidence. 5 U.S.C. 7703(c). Thus, by incorporating 5 U.S.C. 7703(c) into 5 U.S.C. 8347(d)(2), Congress affirmatively authorized the Federal Circuit to review a disability decision of the MSPB with regard to questions of law and procedure, but only in the narrow category of agency-filed mental disability cases.[30] The fact that Congress did not similarly authorize review of questions of law or procedure with respect to other disability retirement claims "provides persuasive evidence that Congress deliberately intended to foreclose" judicial review of such questions in all other cases. *United States* v. *Erika, Inc.*, 456 U.S. at 208. See also *Block* v. *Community Nutrition Institute*, No. 83-458 (June 4, 1984), slip op. 6.

The logic and purpose of the narrow exception in 5 U.S.C. 8347(d)(2) further reinforce the conclusion that judicial review is foreclosed in this case. In adverse actions and related matters typically covered by 5 U.S.C. 7701(a) and 7703(b)(1), the agency initiates the proceedings against the employee. Under the civil service retirement program, on the other hand, proceedings ordinarily are initiated when an individual files an application for benefits. However, Congress determined in 1980 that where the agency rather than the employee files the retirement application and does so on the ground that the employee has a disabling mental impairment, the process closely resembles an adverse action, especially in light of the stigma that may attach to an OPM finding

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[30] See also H.R. Rep. 96-1080, *supra*, at 3, 6; S. Rep. 96-1004, *supra*, at 4; 126 Cong. Rec. 14816 (1980) (remarks of Rep. Spellman); *ibid.* (remarks of Rep. Corcoran); *id.* at 29700 (remarks of Sen. Pryor).

of mental impairment. See S. Rep. 96-1004, 96th Cong., 2d Sess. 2-3, 5 (1980); H.R. Rep. 96-1080, 96th Cong., 2d Sess. 3, 8, 10 (1980); 126 Cong. Rec. 14815-14816, 14817 (1980) (remarks of Rep. Spellman). It is consistent with this determination for Congress to require that the formal administrative and judicial review procedures applicable to adverse actions under 5 U.S.C. 7701 and 7703 be followed in this sensitive area. The considerations that motivated Congress in permitting judicial review of the question of disability in this narrow category of cases simply do not apply where, as here, the employee himself filed the application for retirement benefits and did so based on an alleged physical disability.[31]

B. Judicial Review Of Disability Determinations Is Not Available Under The "*Scroggins* Formula"

Despite the unambiguous language of 5 U.S.C. 8347(c), petitioner argues (Pet. Br. 20) that judicial review of administrative decisions on the question of disability should be permitted under what he labels the "*Scroggins* standard." He relies on opinions of the Court of Claims holding

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[31] Petitioner's reliance (Pet. Br. 20) on *United States* v. *Clark*, 445 U.S. 23, 34 n.11 (1980), as supporting a right of judicial review is wholly misplaced. Petitioner asserts that the Court there held that the Court of Claims had jurisdiction to review the Civil Service Commission's interpretation of a statute that (petitioner states) concerned "dependency and live-in status," even though 5 U.S.C. 8347(c) bars judicial review of questions of "dependency" as well as "disability." This characterization of the issue in *Clark* is disingenuous. *Clark* involved only the construction of a live-in requirement as a prerequisite to the eligibility of an illegitimate child for survivors benefits. The "dependency" requirement had been deleted from the relevant statutory provision. See 445 U.S. at 29-32. *Clark* therefore did not involve a question of "dependency" within the meaning of 5 U.S.C. 8347(c). Section 8347(c) accordingly was not even cited in the Court's opinion or the parties' briefs. The footnote upon which petitioner relies addressed an unrelated question of Tucker Act jurisdiction raised by the United States with respect to the constitutional claim in the case. See U.S. Br. 17-24.

that judicial review of such decisions is available "where there has been a substantial departure from important procedural rights, a misconstruction of the governing legislation, or some like error 'going to the heart of the administrative determination.'" See *Scroggins* v. *United States*, 397 F.2d 295, 297, cert. denied, 393 U.S. 952 (1968). The Federal Circuit in this case explicitly disavowed the *Scroggins* formula that had been employed by its predecessor court. See J.A. 50-52. Its decision to do so was entirely sound, because the *Scroggins* formula simply has no basis in the terms or purposes of the preclusion provision. Nor, in fact, did the Court of Claims ever purport to find such a basis or otherwise consider the matter in any depth. Instead, the Court of Claims adopted the quoted language from a prior decision of another court in which the statutory bar did not even apply, and then repeated the formulation in subsequent decisions without further analysis.

1. The language quoted above from *Scroggins* first appeared in a decision of the Court of Claims in *Gaines* v. *United States*, 158 Ct. Cl. 497, 502, cert. denied, 371 U.S. 936 (1962). The court in *Gaines* lifted the language verbatim from the opinion of the District of Columbia Circuit in *Smith* v. *Dulles*, 236 F.2d 739, 742, cert. denied, 352 U.S. 955 (1956), which, like *Gaines* and *Scroggins*, was a case in which the employee had been retired involuntarily on the basis of a mental disability and the employee was seeking judicial review of that determination and an award of back pay. However, the decision in *Smith* v. *Dulles* was rendered prior to the enactment of the preclusion of review now contained in 5 U.S.C. 8347(c). See page 19 & note 28, *supra*. That statutory provision therefore did not apply in *Smith* v. *Dulles*, and the court in that case accordingly did not construe or even mention it. Instead, the language in *Smith* v. *Dulles* that was later adopted by the Court of Claims as the *Scroggins* formula was quoted directly from an earlier opinion of the District of Columbia Cir-

cuit that did not even involve the civil service retirement program. 236 F.2d at 742 & n.11, quoting *Powell* v. *Brannan*, 196 F.2d 871, 873 (1952).[32]

The Court of Claims in *Gaines* adopted the language from *Smith* v. *Dulles* without any apparent recognition that the preclusion of review did not apply in that case or that its intervening enactment had affected the authority of a court to review an administrative decision on a question of disability. 158 Ct. Cl. at 501-502. In *Scroggins*, however, unlike in *Gaines*, the Court of Claims did acknowledge that the statutory bar in 5 U.S.C. 8347 (c) "is a special and unusual restriction on judicial examination" (397 F.2d at 297). But it then quoted the language from *Gaines* and cited *Smith* v. *Dulles*, without acknowledging that *Gaines* had adopted the formulation from *Smith* v. *Dulles* even though that case was inapposite and that *Gaines* had, as a result, effectively ignored the statutory preclusion of judicial review on questions of disability. 397 F.2d at 297.

It was in this casual and unwitting manner that the "*Scroggins* formula"—drawn verbatim from *Gaines* and *Smith* v. *Dulles*, and ultimately from a District of Columbia Circuit case that did not even involve the civil service retirement program—was adopted by the Court of Claims as the appropriate standard of review in disability retirement cases. The net effect, of course, was to attach no significance whatever to the explicit statutory bar to judicial review. The *Scroggins* formula then was reiterated by the Court of Claims in a handful of subsequent civil

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[32] The court in *Smith* v. *Dulles*, 236 F.2d at 742 n.11, also cited the decision in *Dismuke* v. *United States* (discussed at pages 18-19, *supra*), in which this Court held that a denial of retirement benefits could be challenged in a suit under the Tucker Act. 297 U.S. at 172. However, *Dismuke*, which did not involve a claim based on disability, was decided well before enactment of the statutory preclusion of judicial review at issue here. Moreover, the Court in *Dismuke* acknowledged that Congress could "provide an administrative remedy and make it exclusive," but held that Congress had not then done so. *Id.* at 172-173.

service disability retirement cases without further analysis.[33] Because the Court of Claims had thus never actually considered the effect of the statutory preclusion of review in 5 U.S.C. 8347(c), the Federal Circuit in this case acted responsibly in reassessing the *Scroggins* formula.

2. The Federal Circuit also was correct in repudiating the *Scroggins* formula after reexamining the issue. The *Scroggins* formula—permitting a court to set aside an administrative decision on a question of disability "where there has been a substantial departure from important procedural rights, a misconstruction of the governing legislation, or some like error 'going to the heart of the administrative determination' "—simply has no basis in the text of 5 U.S.C. 8347(c). The quoted language describes a *standard* of judicial review and necessarily presumes that a court has authority to review the administrative action on the merits. And that is how the Court of Claims applied the standard in *Scroggins* and other disability cases. See cases cited in note 33, *supra*. Section 8347(c), however, bars a court even from inquiring into these matters. The Federal Circuit's construction, unlike the largely standardless *Scroggins* formula of the Court of Claims, is faithful to the text and purposes of 5 U.S.C. 8347(c).

Moreover, as Judge Nichols observed in his concurring opinion (J.A. 66-67), this Court's decision in *United States* v. *Erika, Inc.*, firmly supports the Federal Cir-

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[33] *McGlasson* v. *United States*, 397 F.2d 303, 306-307 (Ct. Cl. 1968) (plurality opinion); *id.* at 311 (Nichols, J., concurring); *id.* at 318 (Skelton, J., dissenting); *McFarland* v. *United States*, 517 F.2d 938, 942-943 (Ct. Cl. 1975), cert. denied, 423 U.S. 1049 (1976); *Allen* v. *United States*, 571 F.2d 14, 17 (Ct. Cl. 1978); *Fancher* v. *United States*, 588 F.2d 803, 806 (Ct. Cl. 1978); *Fitzgerald* v. *United States*, 623 F.2d 696, 699 (Ct. Cl. 1980). See also *Polos* v. *United States*, 621 F.2d 385, 392 (Ct. Cl. 1980). In only one of these cases did the Court of Claims actually grant relief (*Allen* v. *United States*), and its holding in that case was promptly overruled by the en banc court in *Polos* v. *United States*.

cuit's decision to abandon the *Scroggins* approach. The Court held in *Erika* that judicial review of benefit amount determinations under Part B of the Medicare Program is foreclosed, relying upon the fact that Congress had expressly provided in 42 U.S.C. 1395ff(b) for judicial review of administrative decisions denying claims for benefits under Part A of the Medicare Program but omitted any such provision under Part B. 456 U.S. at 206-208. In reaching this conclusion, the Court reversed the holding of the Court of Claims that this "implicit" preclusion of review under Part B of the Medicare Program barred judicial review only of factual determinations, not of statutory or procedural issues. *Erika, Inc.* v. *United States*, 634 F.2d 580, 585-586 (1980), rev'd, 456 U.S. 201, 205 (1982). Indeed, the Court of Claims in *Erika* had specifically relied on *Scroggins* and its progeny arising under the disability retirement program. See 634 F.2d at 587. This Court's unanimous reversal of the Court of Claims' holding in *Erika*—which concerned the scope of an *implicit* preclusion of review—fatally undermines the *Scroggins* rationale for avoiding the *explicit* preclusion of review of decisions on questions of disability under the civil service retirement law. See *Hackett* v. *OPM*, 721 F.2d 580, 582 (6th Cir. 1983) ("The *Scroggins* rule has been eroded considerably, if not completely by the decision in * * * *Erika*."); *Lancellotti* v. *OPM*, 704 F.2d 91, 97 n.10 (3d Cir. 1983) ("*Erika* thus casts considerable doubt on the continuing validity of *Scroggins* and its progeny.").

3. Finally, it is significant that the *Scroggins* formula had its origins and thereafter was applied principally in the narrow category of cases in which the agency, not the employee, filed the application for benefits based on the claimant's mental condition.[34] As the court of

[34] *Scroggins* itself and *Gaines* v. *United States* were such cases. So were *Smith* v. *Dulles* and its companion cases decided by the District of Columbia Circuit (*Murphy* v. *Wilson* and *Ellmore* v. *Burke*; note 11, *supra*), upon which the Court of Claims relied in

appeals observed (J.A. 52), the concern that apparently led to the Court of Claims' initial application of the *Scroggins* formula—"that administrators might unfairly force individuals from federal employment with an attached mental condition 'stigma' "—has now "been fully met by Congress's enactment of [5 U.S.C.] 8347(d)(2)," which expressly provides for judicial review in such cases pursuant to 5 U.S.C. 7703. Because Congress thus has addressed the question and fashioned an explicit exception to 5 U.S.C. 8347(c) for the circumstances in which it concluded that judicial review is warranted, the court below properly declined to continue to apply the judicially fashioned *Scroggins* formula in other circumstances for which Congress has not authorized an exception.

Petitioner contends (Pet. Br. 27, 30), however, that the legislative history of the 1980 amendments to 5 U.S.C. 8347 establishes a right of judicial review under the *Scroggins* formula. This contention is in error. The narrow focus of the 1980 amendments was on the perceived need to furnish a right of judicial review in the special situation involving agency-filed applications for retirement benefits based on the employee's mental condition. Congress did not purport to authorize or condone judicial review under the civil service disability retirement program generally. To the contrary, the Senate Report stated that the purpose of the amendments was "to provide an exception to the existing rule that disability decisions of the OPM are final and conclusive and not subject to review" (S. Rep. 96-1004, *supra*, at 3).

Scroggins and *Gaines*, as well as the Court of Claims' subsequent decisions in *McGlasson*, *McFarland* and *Fitzgerald* (note 33, *supra*), which were rendered in 1968, 1975 and 1980, respectively. Except for a passing reference in *Lech* v. *United States*, 409 F.2d 252, 255 (Ct. Cl. 1969), it was not until 1978 (in *Allen* v. *United States*; note 33, *supra*) that the Court of Claims invoked the *Scroggins* formula in a civil service retirement case that did not involve an agency-filed application based on mental disability. The Court of Claims did not discuss the different considerations raised in such a case.

See also *id.* at 2, 4-5; 126 Cong. Rec. 29700 (1980) (remarks of Sen. Pryor). The House Report similarly described the purpose of the amendments as being "to provide an exception to the general rule" in 5 U.S.C. 8347 (c). H.R. Rep. 96-1080, *supra*, at 5. See also *id.* at 2, 6, 8, 10. Representative Spellman, the sponsor of the measure, explained that "access to the courts" is not available to those employees at this time. 126 Cong. Rec. 14817 (1980). See also *id.* at 14815-14816 (remarks of Rep. Spellman); *id.* at 14816 (remarks of Rep. Corcoran).[35]

The House Report does discuss the Court of Claims' decisions in *Scroggins*, *McGlasson* and *McFarland*. H.R. Rep. 96-1080, *supra*, at 4.[36] But as noted above, all of these cases involved agency-filed applications based on the employee's mental condition. That was the precise subject matter addressed by the 1980 amendments, which supplanted the approach taken by *Scroggins* and its progeny in that category of cases. Congress did not address the broader question of judicial review of administrative decisions on questions of disability under the civil service retirement program generally. In fact, the House Committee revised an earlier proposal that would have repealed the preclusion of review in 5 U.S.C. 8347(c) and thus made judicial review available with regard to all disability decisions. See H.R. Rep. 96-1080, *supra*, at 8, 10.

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[35] See also *RFEHB Plan, Survivor Benefit, and Fitness-for-Duty Exams: Hearing on H.R. 2510, H.R. 5410, and S. 716 Before the Subcomm. on Compensation and Employee Benefits of the House Comm. on Post Office and Civil Service*, 96th Cong., 1st Sess. 1, 18, 20-21, 28, 30-33 (1979) [hereinafter cited as *Hearing*].

[36] See also *Hearing* 8, 11-12, 18, 20-21, 28; Subcomm. on Compensation and Employee Benefits of the House Comm. on Post Office and Civil Service, 95th Cong., 2d Sess., *Forced Retirement/Psychiatric Fitness for Duty Exams* 14-16, 19-20 (Comm. Print 1978).

As petitioner points out (Pet. Br. 27-28, 29), letters from the Director of OPM to the House and Senate Committees did state that expanded judicial review should be limited to involuntary retirements and that it was appropriate that OPM decisions on voluntary applications be conclusive, reviewable only to determine whether there had been a substantial procedural error, misconstruction of governing legislation, or some like error going to the heart of the administrative determination. H.R. Rep. 96-1080, *supra*, at 3-8; S. Rep. 96-1004, *supra*, at 4-5. But these statements are little more than a description of the *Scroggins* formula as it had been applied by the Court of Claims. They were not necessarily a defense of its correctness as a legal matter, as evidenced by the fact that the government was contending in litigation at approximately the same time that 5 U.S.C. 8347(c) completely bars review. See *Fancher* v. *United States*, 588 F.2d 803, 806 n.3 (Ct. Cl. 1978). Moreover, the focus of the Director's submission was on the new judicial review procedures, which he argued should not be applied in cases other than the involuntary mental disability cases that raised unique concerns.[37]

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[37] Another OPM witness stated that questions of proper procedure or constitutional issues could be taken to court and that only the question of disability, which he described as a "question of medical fact," is actually barred by 5 U.S.C. 8347(c). *Hearing* 4. But this passing statement, which is itself ambiguous, presumably was based on experience under the erroneous *Scroggins* formula. The witness's statement is also internally inconsistent. At the same page of his testimony, he described 5 U.S.C. 8347(c) as similar to the statutory preclusions of review under the veterans' benefits law and the Federal Employee Compensation Act, which expressly bar review on questions of law as well as fact. See pages 37-38, *supra*. Moreover, a Subcommittee Associate Staff Counsel stated that *Scroggins* and its progeny did bar review on procedural questions. *Hearing* 4. He also explained that the prior version of the bill that would have repealed the preclusion of review in 5 U.S.C. 8347(c) was intended to permit the Court of Claims to consider "due process" (*i.e.*, procedural) issues (*Hearing* 4, 20-21), thereby implying

Nor did Congress in 1980 actually reenact the entire sentence in 5 U.S.C. 8347(c) that contains the preclusion of review, such that Congress thereby could be thought to have incorporated a particular judicial construction of that clause. Compare *Lorillard* v. *Pons*, 424 U.S. 575, 580-581 (1978). Congress amended 5 U.S.C. 8347(c) only to insert at the beginning of that sentence the phrase: "Except to the extent provided under subsection (d) of this section * * *." 94 Stat. 2696. Thus, even if the legislative history reflected a belief by some Members of Congress that judicial review was available on questions of disability under the civil service retirement program generally, notwithstanding 5 U.S.C. 8347(c), Congress did nothing to enact that view into law. See J.A. 58-59. At most, such a view would be the interpretation by some Members of a subsequent Congress 24 years after enactment of the clause, which is entitled to little weight. See, *e.g.*, *CPSC* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 116-120 (1980). In these circumstances, the Federal Circuit correctly declined to read the legislative history of the 1980 amendments as undermining the plain language of the statutory bar in 5 U.S.C. 8347(c).

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that 5 U.S.C. 8347(c) does bar review of procedural issues where, as here, that section applies. In short, no clear understanding of the meaning of 5 U.S.C. 8347(c) emerges from the legislative history of the 1980 amendments.

CONCLUSION

For the reasons stated in Point I, the judgment of the court of appeals should be vacated and the case remanded to the court of appeals with instructions to transfer the case to the Claims Court pursuant to 28 U.S.C. 1631. If the Court does not follow that course, the judgment of the court of appeals dismissing the appeal should be affirmed.

Respectfully submitted.

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